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Mailed:
March 31, 2004
Paper No. 14
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re 1051 FM, LLC

Serial No. 76266486

Dan J. Alpert for 1051 FM, LLC.

Ingrid C. Eulin, Trademark Examining Attorney, Law Office
111 (Craig Taylor, Managing Attorney).

Before Hanak, Bucher and Drost, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant, 1051 FM, LLC, seeks registration on the
Principal Register for the mark as shown below:



for "broadcasting namely radio broadcasting" in International Class 38.¹

This case is now before the Board on appeal from the final refusal to register on the ground that the term eFM is merely descriptive of applicant's services under Section 2(e)(1) of the Lanham Act, 15 U.S.C. §1052(e)(1).

Both applicant and the Trademark Examining Attorney have fully briefed the case. Applicant did not request an oral hearing before the Board.

We affirm the refusal to register.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, if it immediately conveys information of significant ingredients, qualities, characteristics, features, functions, purposes or uses of the goods or services with which it is used or is intended to be used. A mark is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. See In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

¹ Application Serial No. 76266486 was filed on June 5, 2001 based upon applicant's allegation of use in commerce since at

The question of whether a particular term is merely descriptive is not decided in the abstract. Rather, the proper test in determining whether a term is merely descriptive is to consider the mark in relation to the services for which registration is sought, the context in which the mark is used or is intended to be used, and the possible significance that the mark is likely to have on the average purchaser encountering the services in the marketplace. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978); In re Intelligent Instrumentation Inc., 40 USPQ2d 1792 (TTAB 1996); In re Consolidated Cigar Co., 35 USPQ2d 1290 (TTAB 1995); In re Pennzoil Products Co., 20 USPQ2d 1753 (TTAB 1991); In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986); and In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

The Trademark Examining Attorney takes the position that the letter "e" in applicant's mark stands for "electronic," which is descriptive of applicant's radio broadcasting - especially in that the record shows this station's broadcast is streamed over the Internet. One of the specimens of record, right under the presentation of the involved special-form mark, urges listeners to "Check out

least as early as November 5, 2000.

Kansas City's coolest website: www.e1051.fm." From this website, one can listen to the station's broadcast online. Applicant admits that applicant is an over-the-air radio station that "incidentally" recreates its signal on the Internet.

In support of her refusal to register, the Trademark Examining Attorney has supplied copies of various reference works and LEXIS/NEXIS stories demonstrating that the term "e" often means "electronic." The dictionary evidence shows the prefix "e-" defined as follows: **"e-** (Electronic-) The 'e-dash' prefix may be attached to anything that has moved from paper to its electronic alternative, such as e-mail, e-cash, etc." The Computer Glossary (8th ed. 1998). An online resource (<http://www.acronymfinder.com>) also shows, in pertinent part, the letter "e" to be an abbreviation for the term "electronic." Several excerpts the Trademark Examining Attorney retrieved from the LEXIS/NEXIS database explain within the articles themselves that the "e-" prefix means "electronic" in the context of online features: "e-tickets" from the airlines, "e-coins," "e-stamps" and "e-money" used with "e-commerce," "e-mail," etc. In fact, the Trademark Examining Attorney cites to a recent case decided by this Board where a similar issue was presented:

We have no doubt that in the year 2000, the meaning of the "e-" prefix is commonly recognized and understood by virtually everyone as a designation for the Internet.

In re Styleclick.com Inc., 57 USPQ2d 1445, 1448 (TTAB 2000).

Additionally, there is no question but that the term FM, short for "frequency modulation," represents the current mainstay of broadcast radio services. Hence, the term FM is merely descriptive, if not generic, for radio broadcasting services.

Finally, the Trademark Examining Attorney concludes that the combination of these two terms into the composite term, eFM, is merely descriptive of the recited services.

On the other hand, applicant argues that the Trademark Examining Attorney should be reversed because the letter "e" as used by applicant in its Kansas City market is derived from applicant's call letters, KFME. Furthermore, applicant makes the point that the United States Patent and Trademark Office has registered marks like "B100FM," "B101.1," "Q-101," "Q102," "Q104.3," et al. Applicant points out that its primary services are offered over-the-air and that applicant has never used this mark directly to promote its online streaming.

Based on the evidence provided for the record by the Trademark Examining Attorney, we find that applicant's

applied-for mark, with what appears to be an "e" prefix, refers to services available "online" and hence is devoid of any source-indicating significance when added as a prefix to the designation "FM". In the context of radio broadcasting services, placing the descriptive letter "e" in front of the generic term "FM" does not create a distinctive composite. Inasmuch as applicant and an ever-increasing number of applicant's competitors are streaming FM on the Internet, for those listeners, applicant's broadcasting services could well be described as E-FM. We find this to be true under our precedent even though the record contains no evidence that any third-party uses the designation "eFM" to connote an FM signal streamed online.

We acknowledge applicant's argument that applicant has attempted to create a brand image for itself in the Kansas City, Missouri, market as "eFM." Other FM stations around the country have similarly taken a feature of their call letters to create a distinct identifier in the local radio broadcasting market. However, we also agree with the Trademark Examining Attorney that applicant's subjective intention in deriving this particular term is irrelevant whenever the term has another understanding when examined under Section 2(e)(1) of the Lanham Act. If the alleged mark is on its face merely descriptive of a feature or

characteristic of the goods or services, entirely plausible explanations for possible alternative meanings related to applicant's specific situation do not overcome the statutory objection.²

Furthermore, we find that the marks in the third-party registrations placed into the record by applicant are not analogous to the applied-for mark.

Given its meaning for online goods and services, the letter "e" is necessarily treated differently than the letters, "b" or "q" (in the enumerated third-party registration) or the letter "g" (in the hypothetical example used repeatedly by applicant). Deriving a different result on the issue of "mere descriptiveness" under the Trademark Act is not unfair if indeed "e-FM" has possible significance to the average purchaser encountering the services in the marketplace while "g-FM" may well be seen as totally arbitrary.

² In making this statement, we contrast cases like the instant appeal (i.e., where the parochial significance of the combined term is tied to the specific facts of applicant's adoption) with cases of universally recognizable associations, such as the composite mark SUGAR & SPICE being found not to be merely descriptive of bakery products because of associations with the nursery rhyme. In re Colonial Stores Inc., 394 F.2d 549, 157 USPQ 382 (CCPA 1968) is one in a well-known line of cases finding registrable composite marks comprising double entendres or having incongruous meanings.

Secondly, none of the third-party registrations placed into the record by applicant consisted of a single letter before the FM designation. Rather, each mark prominently included numbers that are easily recognizable as specific FM frequencies measured in megahertz on the electromagnetic spectrum. These third-party uses are similar to composite marks such as "e105.1 FM" or "E105" - two variations seen on applicant's specimens of record. Whenever applicant's letter "e" immediately precedes the station's broadcasting frequency, arguably this could well change the commercial impression of the letter "e," making it more likely that prospective consumers seeing the letter "e" in that setting would view it as nothing more than a shortened form of applicant's call letters.

In conclusion, we find that the designation "eFM" is merely descriptive as applied to radio broadcasting services.

Decision: The refusal to register this mark as merely descriptive under Section 2(e)(1) of the Lanham Act is hereby affirmed.